88-1349

No. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1988

UNITED STATES OF AMERICA,

Respondent,

v.

DANIEL PAUL RICHMANN,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

When the Government uses a citizen volunteer as an undercover drug agent, then decides not to use that citizen, but fails to inform the citizen of the termination of his agency, and finally prosecutes him for drug conspiracy violations for acts committed during his putative agency, has the Government violated the citizen's Due Process rights?

II.

Did the District Court err when it required Petitioner to prove that a juror's extrajudicial contact was prejudicial without permitting an interview of the tainted juror?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

United States of America,

Respondent,

vs.

Daniel Paul Richmann,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Daniel Paul Richmann petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

Petitioner was convicted of conspiracy to distribute controlled substances in the District of

Minnesota. Appeal was taken to the Eighth Circuit Court of Appeals which affirmed the conviction. The opinion of the Court of Appeals (Appendix, p.1) is reported at 860 F.2d 837 (8th Cir. 1988). The District Court's rulings are not reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix, p.14) was entered on October 26, 1988. Petitioner's petition for rehearing and rehearing en banc was denied on December 13, 1988 (Appendix, p.15). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

On December 19, 1986, Dan Richmann was the President and Chief Executive Officer of Ackerson Construction Company. Until that date, he believed that he was also an undercover drug informant for the Drug Enforcement Administration (DEA) Task Force in Minneapolis. When a search warrant was executed on December 19, 1986, at his office, however, he was told that the DEA Task Force had decided long before not to use him. That was the first time Dan Richmann learned of any such decision.

Soon after that search, Dan Richmann was indicted for Conspiracy to Distribute Controlled Substances and was tried under the District Court's jurisdiction conferred by 18 U.S.C. § 3231.

Dan Richmann first started using cocaine in 1978. On May 1, 1980, he was admitted to St. Mary's Rehabilitation Center for inpatient treatment of his addiction. He remained free of cocaine until November of 1984 when he began using the drug again. Mr. Richmann's addiction deepened into heavier use until he was again admitted to inpatient treatment in December 1985. After finishing inpatient treatment, Mr. Richmann approached the DEA and offered information on some of the highest placed cocaine dealers in the Minneapolis/St. Paul area, including Vasilious Loukas (Bill Loukas), a man who later would be a co-defendant of Mr. Richmann. Mr. Richmann had neither been arrested nor charged with any crime when he approached the DEA.

Mr. Richmann met with Sergeant Harry Baltzer of the DEA Task Force and discussed setting up drug dealer Bob Tory and accumulating evidence against drug dealer Bill Loukas. After these discussions, Mr. Richmann's reliability as an informant/undercover agent was established by setting up a drug purchase in March 1986. Mr. Richmann introduced an undercover DEA agent to drug dealer Bob Tory and a one ounce cocaine purchase was concluded.

A short time after this successful drug buy, the DEA decided not to use Mr. Richmann as an informant. The DEA claimed that a confidential informant had said that Mr. Richmann had revealed the description and identity of the undercover agent he had worked with in the Tory purchase. The DEA, however, did not tell Mr. Richmann that he would not be used. It was only on December 19, 1986, when a search warrant was executed at his place of business that Mr. Richmann learned of the DEA's decision.

Between March, 1986, when he made the controlled buy, and December 19, 1986, when the search warrant was executed, Mr. Richmann collected evidence against Bill Loukas and kept it in his office. Mr. Richmann had exchanged small bills for money orders for Loukas and kept the receipts in his office. He had a car phone installed in Loukas' car and kept the records in his office. The monthly bills for that phone were also sent to office. This evidence was seized in the December 19th search, with the aid and cooperation of Mr. Richmann, and was used against him to prove an alleged conspiracy with Mr. Loukas.

In June of 1987, Mr. Richmann was convicted by a jury of conspiring to distribute cocaine in violation of 21 U.S.C. § 846. After his conviction, Mr. Richmann discovered that one of his jurors had discussed the case with a third party who was either in the jury pool awaiting selection or was a juror sitting on a different case. As part of the conversation, the juror from this case stated

that Mr. Richmann was being taken advantage of and taken down the Primrose Lane. Mr. Richmann's counsel requested the opportunity to investigate the matter and to have that juror testify regarding the entire conversation to see if the conversation had any prejudicial effect on the jury. The trial court denied the motion, primarily because Mr. Richmann had failed to show any prejudice from the juror's statement.

Appeal was taken to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the judgment of conviction, and later denied a petition for rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

I.

DUE PROCESS VIOLATIONS

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

More than 30 years ago, this Court held that Due Process prohibits convictions based on outrageous police conduct: "Convictions cannot be brought about by methods that offend a sense of justice." Rochin v. California, 342 U.S. 165, 173 (1952) (police cannot pump a suspect's stomach after the suspect has swallowed drug capsules). When police conduct "shocks the conscience," Id. at 172, a defendant's Due Process rights are violated, and dismissal is appropriate.

Since Rochin, the increasing sophistication of the illicit drug trade has forced the courts to allow a wide range of police tactics. This Court has held that law enforcement personnel may

infiltrate drug rings and even participate to a limited extent in unlawful practices. United States v. Russell, 411 U.S. 423, 432 (1973). Federal agents may supply the main ingredient to manufacture a drug, or even the illicit drug itself to trap suspects. See Russell; Hampton v. United States, 425 U.S. 484 (1976). Lower courts have approved the use of large sums of money and threats by drug agents to accomplish their objectives. See, e.g., United States v. Emmert, 829 F.2d 805 (9th Cir. 1987).

The use of informants in drug enforcement is, of course, permissible. See United States v. York, 830 F.2d 885 (8th Cir. 1987). Because the infiltration of drug rings is critical to effective law enforcement, the use of informants is not only permissible, it is indispensable. The indispensable informant, however, is often in a vulnerable and dangerous position. Accordingly, the informant should have the right to know his exact status vis a vis the government. To use a person as an

informant, exposing that person to the dangers of detection, without advising that person when they are no longer being used by the government, is inexcusable. To then prosecute the person for acts committed during his putative agency "shocks the conscience" and should not be allowed.

These are the factual circumstances the Petitioner presents to this Court. In December 1985, petitioner approached the DEA and volunteered information on drug dealers. He even volunteered to act as an undercover agent/informant to a limited extent. Petitioner did this on his own accord, not to earn lenient treatment on a pending charge as most informants, but because he had kicked a bad cocaine habit and wanted to clean up the streets.

The DEA tested Petitioner's reliability with a controlled drug buy in March 1986 and agreed to use him. Soon after, the DEA Task Force decided not to use Petitioner as an informant after a confidential informant said that Petitioner had

revealed sensitive information to others. The critical fact in this case is that **no one from the government informed Petitioner that he would not be used as an informant.**

Ignorant of the Government's decision, Petitioner continued to associate with drug dealer Bill Loukas, despite his fear of Loukas. In his private office, Petitioner collected evidence against Loukas, creating a "paper trail" documenting money laundering and other drug activities. When federal agents searched his office in December 1986, Petitioner was cooperative because he believed he was working for the very people who were confronting him. Throughout the search, Petitioner asked if the agents had talked with Harry Baltzer, his contact on the DEA Task Force. Evidence from that search was used to convict Petitioner.

This case raises the important question of whether Due Process requires the Government to advise an informant that they are no longer being

used, that they are "on their own." This Court has not addressed this issue yet. Due Process cases have always discussed what the police may do when dealing with suspects. The question of what conduct is permissible vis a vis an informant has not been addressed. Because an informant is always in a vulnerable position with respect to both the Government and the drug kingpins they are setting up, the informant can be abused easily. It offends society's "sense of justice" for the Government to be as dishonest with its informants as it is with the suspects. Regardless of an informant's criminal intent, Due Process should require, at a minimum, that the Government advise the undercover informant that the Government has withdrawn its protective umbrella. The reasons for the Government's decision need not be given, but a simple "termination notice" should be sent to the informant.

Petitioner's Due Process issue was raised and briefed in the Eighth Circuit in the context of a "sufficiency of the evidence" argument. The thrust of the argument, however, was that the conduct of the police was so outrageous that his conviction was unjust. See Petitioner's Brief to the Eighth Circuit Court of Appeals, p. 24 ("Such conduct should not be tolerated from the government as a matter of policy, which is why the defense of entrapment exists in the first place."); Petitioner's Memorandum in Support of Petition for Reconsideration by the Eighth Circuit Court of Appeals, p. 1 ("This is an important case because it calls into question the effect that government agents' conduct can have on the issue of intent."); Id. at 12 ("Sgt. Baltzer's conduct in this relationship was outrageous and unprofessional."); Id. at 14 ("Appellant asks this Court to consider carefully the conduct of the Drug Enforcement Administration's agents in this

case in determining whether to review its original decision.")

Petitioner respectfully asks this Court to remedy these serious Due Process violations and grant review.

II.

JUROR MISCONDUCT

THE COURT OF APPEALS HAS SANCTIONED A RADICAL DEPARTURE FROM PRECEDENT AND THE USUAL COURSE OF JUDICIAL PROCEEDINGS BY THE DISTRICT COURT AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

In 1892, this Court held that private communications between jurors and third persons are absolutely forbidden. Mattox v. United States, 146 U.S. 140, 150 (1892). After Mattox, this Court pronounced the following black-letter law:

> "In a criminal case, any private communication, contact or tampering, directly or indirectly with a juror during trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial....The presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant."

Remmer v. United States, 347 U.S. 227, 229 (1954). (emphasis added). It appears then, in a claim of third party communication with a juror, a defendant would satisfy the Remmer standard by showing: 1) a private communication with a juror; 2) the communication was during trial; and 3) the communication was about the matter before the jury.

Petitioner met the Remmer standard. A character witness for the Petitioner was approached by a third party who had had contact with a juror in Petitioner's trial. The third party

said that he had had a conversation with that juror during the trial. In that conversation, the juror said that the Petitioner was being led down the "Primrose Lane" by the Government, an obvious reference to the merits of the case. The rest of the conversation is unknown because the third party could not be identified and the talkative juror was not brought in to testify.

In evaluating this extraneous contact, the Eighth Circuit quoted the Remmer standard, but then added that Petitioner "has not alleged that the juror was improperly influenced or that information prejudicial to Richmann was communicated to the juror." Remmer in no way requires a showing of communication of prejudicial information or improper influence. See United States v. Forrest, 620 F.2d 446, 457 (5th Cir. 1980) ("whether the comments are favorable or unfavorable to the defendant is immaterial"). The only requirement is that the defendant show: 1) communication, 2) during

trial, 3) about the trial. Petitioner made that showing. Requiring a greater showing disregards the presumption of prejudice set forth in Remmer.

The lower court's error was compounded by refusing to allow the defense to call the offending juror to investigate the possibility of prejudice. Petitioner is well aware of the importance of insulating the jury's deliberative process. Generally, that interest precludes the admission of juror testimony to impeach a jury verdict. Fed. R. Evid. 606(b). The exception to that rule, however, is when "extrinsic influence" is alleged, as is here. This Court recently noted that evidentiary hearings in such cases are appropriate:

> "The Courts holdings requiring an evidentiary hearing where extrinsic influence or relationships have tainted the deliberations do not detract from, but rather harmonize with, the weighty Government

> interest in insulating the jury's deliberative process."

Tanner v. United States, ____U.S._____, 107 S.Ct. 2739, 2747 (1987). Thus, the lower Courts' failure to allow (let alone require) an evidentiary hearing should move this Court to exercise its supervisory powers.

In essence, the trial court and the Eighth Circuit have departed from the accepted and usual course of judicial proceedings in two ways. First, the lower courts placed the burden of proving prejudice on the defendant instead of placing the burden of disproving prejudice on the Government as required by Remmer. Second, the lower courts compounded the error by not allowing the Petitioner to call in the offending juror to investigate the scope of the entire extraneous communication to show prejudice. This Court should grant review in the exercise of its supervisory powers to correct those errors.

CONCLUSION

Petitioner respectfully requests that the Court grant his Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Dated: February 9, 1989

APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 87-5369

United States of America,	*	
	*	
Appellee,	*	
	*	
v.	*	Appeal from the United
	*	States District Court for
Daniel Paul Richmann,	*	the District Court of
	*	Minnesota.
Appellant.	*	

Submitted: June 16, 1988

Filed: October 26, 1988

Before LAY, Chief Judge, Brown, * Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

Daniel Paul Richmann appeals his conviction for conspiracy to distribute cocaine. We affirm.

---

*The HONORABLE JOHN R. BROWN, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

I. Background

In December of 1985, Richmann, who has a history of cocaine abuse, contacted a Drug Enforcement Administration (DEA) agent. He told the agent that he would be willing to provide the DEA with the names of many of the large cocaine dealers in the Minnesota Twin Cities area. In connection with this call, Richmann was contacted in February of 1986 by another agent, Sergeant Harry Baltzer of the DEA Task Force. Richmann and Baltzer met and it was agreed that Richmann would provide Baltzer with information about Vasilios (William) Loukas, a large drug dealer in the area and one of Richmann's codefendants.

Initially, in order to test Richmann's reliability, Baltzer asked Richmann to arrange the introduction of a drug dealer to an undercover agent of the DEA. The introduction was made and the agent purchased a small amount of cocaine from the dealer. In early March of 1986, Baltzer and the DEA decided not to use Richmann as an informant in the

future. This decision was made after Baltzer learned from another informant that Richmann had discussed his involvement with the DEA with persons involved in the drug business. However, Richmann was not told that he was no longer working with the DEA. It was felt that to do so would compromise the informant who had told Baltzer of Richmann's activities.

From March of 1986 until his arrest in December of 1986, Richmann continued to associate and deal with Loukas in the distribution of cocaine. On December 18, 1986, a DEA agent, an agent of the Internal Revenue Service and an agent of the Federal Bureau of Investigation executed a search warrant at Richmann's office. Richmann was present during the search. As it progressed Richmann offered a substantial amount of information about his dealings with Loukas and indicated where in the office physical evidence of these activities was located. During the course of the search, Richmann was advised of his Miranda

rights after which he continued to provide the officers with information.

Richmann was later indicted along with three drug dealers. Following a jury trial, Richmann was convicted of conspiracy to distribute cocaine in violation of 21 U.S.C. §§ 841 and 846 and sentenced to eighteen months imprisonment.

II. Discussion

A. Third Party Contact by a Juror

Following his conviction, Richmann filed a motion for a new trial pursuant to Fed. R. Crim. P. 33 based on grounds of juror misconduct. Richmann claimed that one of his character witnesses was approached, after he testified, by a man in the parking garage adjacent to the courthouse. This individual allegedly told the witness that he had spoken to one of the jurors and the juror told him that he thought Richmann was being taken advantage of and "taken down

the primrose lane" by the government. Following a hearing at which the witness related this incident, the court denied Richmann's motion for a new trial and his request to question the individual juror about the incident.

"[A]ny communication with a juror during trial about a matter pending before the jury is deemed presumptively prejudicial to a defendant's right to a fair trial. (Citations omitted.) This presumption of prejudice is not conclusive, but 'the burden rests heavily upon the Government to establish * * * that such contact with the juror was harmless to the defendant.'" United States v. Delaney, 732 F.2d 639, 642 (8th Cir. 1984) (quoting Remmer v. United States, 347 U.S. 227, 229 (1954)). However, Richmann has not alleged that the juror was improperly influenced or that information prejudicial to Richmann was communicated to the juror. The government asserts, therefore, that since the juror was not exposed to any improper influence or prejudicial information, the contact was harmless.

Unless there has been an abuse of discretion by the trial court, we will not set aside the court's decision to deny the motion. United States v. Conzemius, 611 F.2d 695, 696 (8th Cir. 1979). We find that the misconduct complained of, if any, was harmless to Richmann. No information appears to have been conveyed to any member of the jury. Rather, if Richmann's witness is believed, it appears that this juror was expressing an idea which was favorable to Richmann. There was no evidence that this particular juror, or any other member of the panel, had been exposed to prejudicial information or evidence other than that which was introduced at the trial. In fact, as indicated, the comment the juror purportedly made to Richmann's witness was beneficial to Richmann and detrimental to the government. Therefore, a new trial was not warranted.

As regards Richmann's request to question the jury, it is generally considered preferable to insulate jury deliberations. "The policy does not, however, foreclose testimony by jurors as to prejudical extraneous information

or influences injected into or brought to bear upon the deliberative process." Scogin v. Century Fitness, Inc., 780 F.2d 1316, 1319 n.5 (8th Cir. 1985). There being no showing, however, that this was the situation, the district court was correct in not making further inquiry into the jury deliberations.

B. Inadmissible Evidence

Richmann's second assignment of error involves the testimony of Sergeant Baltzer concerning the reason he discontinued his use of Richmann as a confidential informant. Baltzer testified at trial that he had received information from an informant that Richmann had stated at a party that he had compromised a DEA agent. Baltzer further testified that Richmann had recited that he had provided specific information to other drug traffickers about the DEA agent, including a description of the agent and the agent's undercover name.

Richmann objected to the testimony claiming it was hearsay. In addition, he argued that because his DEA involvement was a crucial part of his defense, the testimony was unfairly prejudicial and the prejudice outweighed the probative value of the testimony. Richmann also claimed that the admission of the statements of the unidentified informant violated his sixth amendment right to confront the witnesses against him. The government argued that the Baltzer testimony was admissible because it was offered only to show the state of mind of Baltzer at the time he made the decision not to use Richmann as an informant, and not for its truth. The district court ruled that the testimony should be admitted on that basis and instructed the jury that they were not to consider the testimony for the truth of the statements made by Richmann, but rather to consider it as relating to why Baltzer acted as he did. Agent Baltzer's activities within the context of the entire drug investigation were proper matters for the jury to evaluate.

"[E]videntiary rulings are reviewed for an abuse of discretion only * * * " and Richmann has the burden of

showing that the district court abused its discretion in admitting the testimony of Baltzer. United States v. Janis, 831 F.2d 773, 779 (8th Cir. 1987), cert. denied, 108 S. Ct. 1046 (1988). Since Baltzer's testimony as to the informant's statement was of consequence in the determination of issues properly before the jury and the informant's statement was not hearsay as defined by the rules of evidence, the evidence was admissible. We also find, as did the district court, that the evidence was not unfairly prejudicial nor did it violate Richmann's sixth amendment rights.

C. Richmann's Confession

During the search of his office, Richmann spontaneously provided extensive information about his activities with Loukas. About two hours into the search, the agents advised Richmann of his Miranda rights after which he repeated much of the information he had already given.

Richmann, in a pretrial motion, requested that these statements be suppressed. The trial court denied the motion.

Richmann claims that the statements he made during the search were taken in violation of his fifth amendment right against self-incrimination, in spite of the fact that he repeated the statements after receiving Miranda warnings. The Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966) held that law enforcement officers are required to advise a suspect of his fifth and sixth amendment rights prior to a custodial interrogation. The court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444. We find that Richmann was not in custody during the search of his office. He was never denied permission to leave the office, nor did he ask to do so. He was denied permission to contact his wife. However, that does not constitute a significant deprivation of his freedom. Even if Richmann could be considered to have

been in custody during the search, his confession is still admissible because he voluntarily repeated earlier spontaeous but unwarned statements after the administration of the Miranda warnings. Oregon v. Elstad, 470 U.S. 298, 314 (1985).

D. Sufficiency of the Evidence

In order to convict Richmann of conspiracy to distribute cocaine, the goverment had to prove beyond a reasonable doubt that there was an agreement among the coconspirators, one of whom being Richmann, to commit an offense against the United States. In addition, the government must prove that there was an overt act by one of the coconspirators in furtherance of the agreement. Richmann's defense at trial was that he did not engage in any overt acts in furtherance of the agreement with the intent to commit a crime. He claims that he could not have formed the requisite intent because he believed he was working with the DEA. His intent was to assist the DEA, not, he claims,

to commit a crime. In the alternative, he asserts that he was a victim of entrapment.

In reviewing a claim regarding the sufficiency of the evidence, "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. 60, 80 (1942). We recognize that the government had the burden of proving all elements of the crime and of proving that Richmann had a predisposition to commit the crime if entrapment is alleged. United States v. Irving, 827 F.2d 390, 392 (8th Cir. 1987). Having reviewed the evidence presented at trial, we find that there was sufficient evidence for the jury to convict Richmann.

IV. Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 87-5369MN

United States of America,	*	
	*	
Appellee,	*	
	*	
v.	*	Appeal from the United
	*	States District Court for
Daniel Paul Richmann,	*	the District Court of
	*	Minnesota.
Appellant.	*	

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

October 26, 1988

A True Copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

MANDATE ISSUED: 12/29/88

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 87-5369MN

United States of America,	*	
	*	
Appellee,	*	
	*	
v.	*	Appeal from the United
	*	States District Court for
Daniel Paul Richmann,	*	the District Court of
	*	Minnesota.
Appellant.	*	

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

December 13, 1988

Order entered at the Direction of the Court:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Supreme Court, U.S.
FILED
MAY 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1349

In the Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL PAUL RICHMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's conduct in this case was so outrageous as to violate the Due Process Clause.

2. Whether the district court abused its discretion when, at a post-trial hearing, it determined that a third-party contact with a juror was harmless and that the juror need not be called for questioning.

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In the Supreme Court of the United States

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No. 88-1349

DANIEL PAUL RICHMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 860 F.2d 837.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14) was entered on October 26, 1988. A petition for rehearing was denied on December 13, 1988. Pet. App. 15. The petition for a writ of certiorari was filed on February 10, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C.

846. He was sentenced to 18 months' imprisonment. The court of appeals affirmed.

1. In December 1985, petitioner, who had a history of cocaine abuse, contacted a Drug Enforcement Administration (DEA) agent. He told the agent that he would be willing to provide the DEA with the names of large-scale cocaine dealers in the Minneapolis-St. Paul area. Petitioner was subsequently contacted in February 1986 by another agent. Petitioner met with that agent and agreed to provide the DEA with information about Vasilios Loukas, one of petitioner's co-defendants and a large-scale drug dealer in the area. Pet. App. 2.

To test petitioner's reliability, the agent asked petitioner to introduce a drug dealer to another undercover DEA agent. Petitioner arranged the introduction and the agent purchased a small amount of cocaine from the dealer. In early March 1986, however, the DEA learned from another informant that petitioner had discussed his DEA involvement with persons in the drug business. The agency therefore decided not to use petitioner as an informant. It did not, however, tell petitioner that he was no longer working with the DEA because to do so would have compromised the informant who had reported on petitioner's activities. From March 1986 until his arrest in December 1986, petitioner continued to associate and deal with Loukas in the distribution of cocaine. Pet. App. 2-3; Gov't C.A. Br. 3.

On December 18, 1986, federal officials executed a search warrant at petitioner's office while petitioner was present. Both before and after he was advised of his *Miranda* rights, petitioner offered a substantial amount of information about his dealings with Loukas and told officers where they could find physical evidence of these activities in the office. Petitioner was later arrested and indicted. Pet. App. 2-4. In his defense, petitioner argued

that the DEA had entrapped him. Pet. App. 12. The jury returned a guilty verdict.

2. After his conviction, petitioner moved for a new trial on the ground of juror misconduct. Petitioner claimed that after testifying, one of his character witnesses was approached by a man in the parking garage adjacent to the courthouse. The man allegedly told the witness that he had spoken to one of the jurors and that the juror had said he thought petitioner was being taken advantage of and being "taken down the primrose lane" by the government. The district court conducted a hearing at which the witness related the incident. The court then refused petitioner's request to question the juror about the incident, and denied the motion for a new trial. Pet. App. 4-5.

3. The court of appeals affirmed. The court found that the evidence was sufficient to prove that petitioner had criminal intent to commit the offense, and that the evidence of predisposition was sufficient to justify the jury's rejection of petitioner's defense of entrapment. Pet. App. 11-12. The court of appeals also rejected petitioner's claim of jury misconduct, finding "that the misconduct complained of, if any, was harmless to [petitioner]." As the court explained, "[n]o information appears to have been conveyed to any member of the jury," and "if [petitioner's] witness is believed, it appears that this juror was expressing an idea which was favorable to [petitioner]." Pet. App. 6.

ARGUMENT

1. Petitioner first contends (Pet. 8-14) that the DEA's failure to inform him that he would no longer be used as an informant constituted outrageous government conduct that violated the Due Process Clause. This claim is without merit.

First, petitioner failed to raise his claim of outrageous government conduct before the court of appeals; he is therefore precluded from raising the issue now. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In his court of appeals brief and his petition for rehearing, petitioner argued only that the evidence was insufficient to support his conviction and rebut his defense of entrapment. Contrary to his contention (Pet. 13-14), petitioner never made an "outrageous conduct" argument below, nor did he cite any authority to support that legal theory. See Richmann C.A. Br. 17-25; Richmann Pet. for Reconsideration 6-15. His passing remarks criticizing the government's conduct (see Pet. 13-14 (quoting remarks)) were all made in the context of his "sufficiency of the evidence" argument; they did not apprise the court of appeals of any other legal claim (see Pet. App. 11-12), and they cannot be construed at this late date as preserving an independent constitutional issue.

In any case, petitioner's due process claim fails on its facts. The due process defense is a very narrow one. Prosecution is barred only when the "conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction," *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973), and only when "the government activity in question violates some protected right of the *defendant*," *United States* v. *Payner*, 447 U.S. 727, 737 n.9 (1980) (emphasis in original). As one court has noted, the government misconduct must be "so grossly shocking and so outrageous as to violate the universal sense of justice." *United States* v. *Aguon*, 851 F.2d 1158, 1171 (9th Cir. 1988); see also *United States* v. *Duvall*, 846 F.2d 966, 973 (5th Cir. 1988) ("a due process violation will be found only in the rarest and most outrageous circum-

stances"); *United States* v. *Shoffner*, 826 F.2d 619, 626 (7th Cir.), cert. denied, 108 S. Ct. 356 (1987).

The failure of the DEA to tell petitioner that he was no longer being used as an informant was not "grossly shocking" or "outrageous" in light of the circumstances surrounding the investigation. Petitioner himself began his relationship with the DEA, offering his services as an informant. Pet. App. 2. After beginning to work with him, the DEA learned that petitioner had compromised the identity and safety of a DEA agent by describing the agent to other people in the cocaine business. Pet. App. 3. The DEA therefore decided not to use petitioner as an informant; it could not, however, notify petitioner of its decision, because to do so would have jeopardized the other informant who had reported on petitioner's activities. Gov't C.A. Br. 3; see Pet. App. 2-3.

Under these circumstances, the government's conduct was not improper, let alone "so grossly shocking and so outrageous as to violate the universal sense of justice." See *United States* v. *Arteaga*, 807 F.2d 424, 426 (5th Cir. 1986) ("The appropriateness of the government's conduct turns * * * on the needs of law enforcement."). No court has reversed a conviction on such a showing, and courts have regularly declined to find more plausibly blameworthy government conduct to be sufficiently "outrageous" to justify reversal. See, *e.g.*, *United States* v. *Ramirez*, 710 F.2d 535, 539-540 (9th Cir. 1983) (no due process violation where police may have coerced or unlawfully induced informant's cooperation, and where they misled him after concluding he was a double agent, in order to gain as much information from him as possible); see also *United States* v. *Simpson*, 813 F.2d 1462, 1464-1468 (9th Cir.) (no due process violation where FBI continued to use informant after learning that she was exploiting sexual relationship with defendant in order to get information from

him), cert. denied, 108 S. Ct. 233 (1987); *United States* v. *Tobias*, 662 F.2d 381, 385-387 (5th Cir. 1981) (no due process violation where police supplied formula, some of ingredients, and step-by-step advice on manufacturing drug to defendant), cert. denied, 457 U.S. 1108 (1982).*

2. Petitioner also contends that the district court abused its discretion when it ruled that a third party's contact with a juror did not require reversal.

Any "private communication * * * with a juror during a trial about the matter pending before the jury is * * * deemed presumptively prejudicial." *Remmer* v. *United States*, 347 U.S. 227, 229 (1954). Nonetheless, the "presumption is not conclusive," although "the burden rests heavily upon the Government to establish * * * that such contact with the juror was harmless to the defendant." *Ibid.* The "allowance or refusal of a new trial [on the basis of improper juror communications] rests in the sound discretion of the court to which the application is addressed." *Mattox* v. *United States*, 146 U.S. 140, 147 (1892).

Here, the government met its burden to establish that the contact between the third party and the juror was harmless. As the court of appeals underscored (Pet. App. 5-6), it did not appear that the juror who may have had the

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* Petitioner's claim is especially unpersuasive here, because petitioner had been advised that if he became involved in anything illegal that was not under the supervision and control of the DEA, he could be arrested. Petitioner was specifically told that he was not a police officer and that he had no police function. He was instructed that if he were to become involved in a criminal enterprise of any type, he was required to notify the DEA so that the agency could control the situation. Gov't C.A. Br. 1-2. The actions that petitioner took after the DEA had ceased to use him as an informant, including the laundering of narcotics money, were done without notifying the DEA or obtaining its approval. Gov't C.A. Br. 12-14.

improper contact received any information from the third party that could have been conveyed to the other members of the jury. Pet. App. 6. As the court observed, "[t]here was no evidence that this particular juror, or any other member of the panel, had been exposed to prejudicial information or evidence other than that which was introduced at the trial." *Ibid.* In fact, the comments made by the juror to petitioner's character witness "express[ed] an idea which was favorable to [petitioner]" and "detrimental to the government." *Ibid.* Refusal to grant a new trial on these grounds did not constitute an abuse of discretion.

Nor can this conclusion be challenged on the ground that, at the hearing on the claim of juror misconduct, the district court did not allow defense counsel to question the juror who had supposedly spoken to the third person. See Pet. 17-18. A trial court "has a great responsibility and wide discretion in dealing with a motion for a new trial based on allegations of juror misconduct." *United States* v. *Jones*, 707 F.2d 1169, 1173 (10th Cir.), cert. denied, 464 U.S. 859 (1983); accord *United States* v. *Hendrix*, 549 F.2d 1225, 1227 (9th Cir.), cert. denied, 434 U.S. 818 (1977); see 3 C. Wright, *Federal Practice and Procedure* § 554, at 261-262 (2d ed. 1982). The district court in this case conducted a hearing at which it took the testimony of the third party who was the source of the report of juror misconduct. As the court of appeals observed (Pet. App. 6-8), there was no evidence adduced at the hearing to suggest that the juror was improperly influenced or that information prejudicial to petitioner was communicated to the jury. In these circumstances, and in light of the need to protect the integrity of the deliberative process, the district court did not abuse its discretion by refusing to permit the juror to be questioned about the effect of the contact with the third party on the jury's deliberations.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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